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No. 21

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

THOMAS MARTINO,
Petitioner,

vs.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION OF DEFENDANT FOR REHEARING AND ARGUMENT

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IN THE

Supreme Court of the United States

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CERTIFICATE OF COUNSEL

Larry S. Davidow, attorney for the Defendant in the above entitled cause, does hereby certify that the attached petition for a rehearing is presented in good faith and not for delay.

LARRY S. DAVIDOW.

IN THE

Supreme Court of the United States

October Term, 1945

No. 21

THOMAS MARTINO,
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vs.

MICHIGAN WINDOW CLEANING COMPANY.

PETITION FOR REHEARING

Now comes the Michigan Window Cleaning Company, a Michigan Corporation, by Davidow & Davidow, its attorneys, and petitions this Court for a rehearing of the above entitled cause, and says:

I.

That the opinion of the Court filed in this Court and cause shows that the same was based upon a misapprehension of the facts in the case at bar and the law applicable thereto.

II.

At the outset, we wish to call this Court's attention to the chronological history of this cause. The petition

for Writ of Certiorari was first denied by this Court on February 26, 1945. Thereafter, after a lapse of almost five months, this Court reversed itself, when certiorari was granted *sua sponte* by this Court on June 18, 1945.

III.

This case appears to have been decided upon the assumption that the facts herein were similar to the facts in the case of *Roland Electrical Company vs. Walling*, decided January 28, 1946.

A reading of the facts in the *Roland Electrical Company* case shows that they are dissimilar from the facts in the case at bar. In the case at bar the Defendant is engaged in cleaning windows. All of the plaintiffs work on the cleaning of windows. While the original complaint stated that the Defendant was engaged in "washing windows, painting and similar maintenance work," the only issue presented to the Court in the stipulation of facts and in the brief submitted, was whether window washing was a service occupation.

IV.

The opinion of this Court assumes as a fact that the cleaning of windows is essential to industry. That was a disputed question of fact, raised only after appeal, and so argued by plaintiffs but never passed upon by any of the courts.

V.

The ruling of this Court on the question of the union agreement is apparently based upon a misapprehension of the facts. This was not a case of an attempt to cir-

cumvent the Wage and Hour Law, but was an honest negotiation, at least so far as the employer was concerned, to arrive at an amicable settlement of conditions of employment with the union. The contract signed was on a form prepared and submitted by the union to the employer. If the ruling of this Court is to stand, then the action of the union in submitting and prevailing upon the employer to sign the agreement amounts to a constructive fraud against the employer.

This petition is based upon the files and records of this Court and cause and the argument in support thereof attached hereto and made a part hereof.

MICHIGAN WINDOW CLEANING COMPANY,
Defendant.

By DAVIDOW & DAVIDOW,
By Larry S. Davidow,
Attorneys for Defendant.

ARGUMENT

When the petition for certiorari was denied by this Court on February 26, 1945, the defendant assumed that the matter was disposed of. Then, after a lapse of almost five months, without warning or hearing counsel for defendant was notified that the Court had reversed itself and certiorari had been granted by this Court on June 18, 1945. The question can therefore be asked, "Why was this instant case singled out for reopening, particularly in view of the fact that as this Court has repeatedly held, each case is determined upon its own particular facts?"

Defendant is a Service Establishment

The opinion of the Court filed in this cause assumes that the facts in the case at bar are similar to the facts in the *Roland Electrical Company* case decided by this Court on January 28, 1946. A reading of the facts in the *Roland* case and the facts in the case at bar shows that the facts are altogether dissimilar.

In the case at bar the defendant is engaged in washing windows. The union representing the plaintiffs is the Detroit Window Cleaners Union, Local 139. All of the plaintiffs were or are employees of the defendant engaged in washing windows. Even using the criterion suggested by the Administrator of the Fair Labor Standards Act, the "services to an ultimate consumer," brings the services of the defendant within the meaning of the term, "service establishment." The defendant washes windows of buildings which it neither owns, occupies nor rents. It has absolutely nothing to do with the activities going

on in the building. Insofar as the defendant is concerned, its services end with the ultimate consumer, its customer. The defendant has absolutely nothing to do with any activity going on in the building. It sells nothing but its services. Its services are confined to the washing of windows on buildings. It comes in no contact at all with any of the products manufactured or produced in the building. It comes in no contact whatsoever with any of the machinery used in the production of goods. Many of its customers are private householders. Many of its customers are retail establishments. The ultimate consumer, insofar as the defendant is concerned, is the owner or occupant of the building in which are the windows washed by defendant.

The *Roland Electrical Company* case, on the other hand, involved the work on motors which were used in the production of goods for commerce. This Court has assumed that the washing of windows is an industry essential to the production of goods for commerce. The question of whether or not washing windows is necessary was a disputed question of fact which the lower court did not pass upon because it was not necessary, the cause having been decided upon the fact that the defendant was a service establishment. The question of the necessity of washing windows was first raised by the plaintiffs in their brief after certiorari was granted following the original denial of the petition for writ of certiorari. No testimony was taken and it still should be determined after all the facts have been submitted.

The question can fairly be asked: "Would any industry cease functioning if windows were not washed?" The question suggests the answer. Window cleaners have gone on strike and not a single industry has stopped.

or even been discommoded. Many industrial buildings have no windows at all. A large number of industrial buildings have frosted glass windows which certainly are not light-giving. In virtually every industrial plant, most of the work is done away from the windows, because all of the machinery is not placed around the outside walls of the plant, but is contained within the plant. During most of the time in dispute in the case at bar, many of the industrial plants had their windows "blacked out" for security reasons because of war work. Even the chamber in which this Court sits has hangings on the walls where windows might be, cutting off any natural light from the outside. The lighting in the Supreme Court chamber is achieved by artificial light, demonstrating beyond any question that the condition of windows has nothing to do with the creation of the necessary light required for the business involved. Window cleaning is far more essential in a private home than it is in any industrial building. It can be shown that window washing has absolutely nothing to do with the activities going on in an industrial building.

It is the contention of the petitioner that the decision of this Court in the case of *10 East 40th Street Building vs. Callus*, decided in the October term, 1944, reported in 89 L. Ed. Advance Opinions, 1245, 6-7, is applicable. This Court, on pages 1246 and 1247, said:

> "The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under paragraph 16 (b) of the Fair Labor Standards Act, 29 U.S.C.A. paragraph 215, 9 F.C.A. Title 29, paragraph 215, for claims of overtime payment to which they are entitled if their occupations be deemed 'necessary to the production' of goods for commerce. Concededly they are not

'engaged in commerce.' The District Court dismissed the suit. 51 F. Supp. 528. The Circuit Court of Appeals reversed. 146 F. (2nd) 438. By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable area and 48% of the rented area, the maintenance employes of the owners of the building are engaged in occupations 'necessary for the production' of goods for commerce. Conflict between this result and that reached by other circuits led us to bring the case here. 324 U. S. ——, ante, 565, 65 S. Ct. 678 (footnote).

"The series of cases in which we have had to decide when employees are engaged in an 'occupation necessary to the production' of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. *Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act.* See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 87 L. Ed. 460, 63 S. Ct. 332; *Walling v. Southern Package Corp.*, 320 U. S. 540, 88 L. Ed. 298, 64 S. Ct. 320; *Armour & Co. v. Wantock*, 323 U. S. 126, ante, 120, 65 S. Ct. 165; *Skidmore v. Swift & Co.*, 323 U. S. 134, ante 125, 65 S. Ct. 161. In giving a fair application to paragraph 3 (j), courts must remember that the 'necessary' in the phrase 'necessary to the production of goods for commerce' is colored by the context not only of

> the terms of this legislation but of its implications in the relation between state and national authority.' *A. B. Kirschbaum Co. v. Walling, supra* (316 U. S. at 525, 86 L. Ed. 1548, 62 S. Ct. 116). For as was pointed out in *Walling v. Jacksonville Paper Co., supra* (317 U. S. at 570, 87 L. Ed. 467, 63 S. Ct. 332), we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' *We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.*" (Italics ours.)

In the case at bar, the ultimate consumer is, as we have stated above, the owner or occupant of the building. The work of the defendant does not touch any part of the equipment which produces goods for commerce or any of the goods being produced for commerce. To carry the findings of this Court to the logical conclusion, it would be necessary for the employer to ascertain what activity was being conducted in each of the buildings where windows are washed by its employees. The employer would have to make it his business to find out what business each of his customers was engaged in.

As stated by this Court in the case of *Walling vs. Jacksonville Paper Co.*, 317 U. S. 569; 87 L. Ed. 460, Headnote 4:

> "*In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.* S. Rep. No. 884, 75th Cong. 1st Sess. p. 5; 83 Cong. Rec. 75th Cong. 3d Sess. Pt. 8, p. 9169. *Moreover, as we stated in A. B. Kirschbaum Co. v. Walling, supra* (316 U. S. pp. 522, 523, 86 L. Ed. 1646, 1647, 62 S. Ct. 1116), *Congress*

did not exercise in this Act the full scope of the commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transaction 'affecting commerce.' But as we noted in the Kirschbaum case the Act did not go so far." (Italics ours.)

The Union Contract

The provisions of the Fair Labor Standards Act in awarding an employee not only the amount of wages he would have been entitled to, but an equal amount as liquidated damages for violation of the law, implies a wrongful act on the part of the employer in failing to abide by the law.

In the case at bar it is admitted that the defendant and the union representing the plaintiffs had entered into negotiations each year and signed agreements calling for closed shop, minimum wages, maximum hours and overtime pay. The contract was on a form prepared and submitted by the union and signed by the employer. It is undisputed that all the conditions of the contract were fully performed by the defendant employer.

The defendant employer honestly believed that the Fair Labor Standards Act did not apply to its employees. It acted honestly and fairly. If, as it now appears, the employer is to be held subject to the Act, then the action of the union in submitting the contract to the employer which the employer signed in good faith, amounts to a constructive fraud against the employer, because the

plaintiffs are now seeking to penalize the defendant for the plaintiffs' own acts. The effect of the action of the plaintiffs, if sustained, could very well mean putting the defendant and other employers similarly situated out of business. The defendant sells no goods; it performs services for others under contract. Its charges to the customers are based primarily upon the wages the defendant pays to its employees because the labor is the major part of the cost of its services. If the defendant is to be chargeable not only with the actual amount of wages, but also a penalty of like amount, together with attorneys' fees and costs, the defendant will be in a position of having to pay out large sums of money in excess of profits earned. The defendant had the right to rely upon the union contract entered into with the plaintiffs and their duly authorized representatives and in reliance upon that contract, to have entered into contracts with its customers for the services to be performed.

We respectfully submit that the facts in the instant case do involve exceptional circumstances which should lead to a rehearing in the cause. The opinion of this Court in the case of *Brooklyn Savings Bank vs. O'Neil*, referred to in the opinion in the instant case, lists the argument against waiver of the provision in the law as to liquidated damages. Not a single one of the reasons given in the *Bank vs. O'Neil* case for upholding the provision for liquidated damages applies in the instant case. In fact, Mr. Justice Reed inferred that exceptional circumstances may justify a waiver when he said "nor does the instant case involve exceptional circumstances of the kind held to justify a waiver agreement such as was upheld in *Ft. Smith & W. Ry. Co. vs. Mills*, 253 U. S. 206; 64 L. Ed. 862-4, Sup. Ct. 526."

The case of *Ft. Smith & W. Ry. Co. vs. Mills*, 64 L. Ed., 862, so referred to, involved the payment of wages agreed upon by the Receiver of the Railroad and the employees, which were lower than the rates provided for in the Adamson law. Mr. Justice Holmes, on page 863, said:

> "But the bill in Wilson vs. New raised only the general objections to the act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. *It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss.* See Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, ante, 323, P.U.R. 1920C, 579, 40 Sup. Ct. Rep. 183. It was not decided that there might not be circumstances to which the act could not be applied consistently with the 5th Amendment, or that the act, in spite of its universal language, must be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce." (Italics ours.)

CONCLUSION

We can not urge too strongly the manifest hardship and injustice that would be worked upon the defendant if the punitive clause of the Wage Hours Act were to be imposed upon it. It stands unchallenged that the defendant has acted in good faith and has obeyed every provision of the contract which the Union itself had prepared on its own printed form and which the defendant had signed.

For several years after the Wage Hours Act became the law, the defendant was led to believe, by the plain-

tiffs, that this Act did not apply to the defendant. Accordingly, defendant made commitments for services to be rendered to its customers predicated upon the wages fixed in the agreement. The chief and outstanding item of cost in rendering window cleaning service is labor. To have the defendant required to pay alleged overtime with damages in an equal amount, would create a burden that can very well put the defendant out of business.

While we do not believe that the clear language of the Congress, exempting service establishments the major part of whose work is involved in intra-state commerce, should be interpreted by this Court in a manner inconsistent with the plain letter of the law, nevertheless, if this Court is to extend the provisions of the Wage Hours Act far beyond the clear purview of the law itself, then is it not fair to ask that when such a procedure is to be adopted, that it should become effective from the time of such judicial determination? Otherwise, employers acting in good faith and relying upon the clear and unequivocal statement of the law as passed, coupled with legal advice rendered by professional counsel representing both the union and the employer, proceed in their negotiations with unions, at their peril, never being able to tell in advance the limits of liability and the definition of their rights. We can not believe that this Court would intentionally create such an atmosphere of uncertainty on legislation involving labor-management relations so as to make it virtually impossible for an employer to undertake commitments, both with his customers and with labor and not know what his obligations and responsibilities are, even though the express language of the statute and professional legal advice combine to advise him as to his rights and responsibilities.

It is because of the grave problem that is created as hereinabove outlined, and because of the public policy that is involved, that we so urgently petition for a rehearing. It can be shown and demonstrated beyond any question, if opportunity is so permitted, that none of the plaintiffs ever expected anything more or beyond the rate of wages fixed in the printed agreement prepared and submitted by the union. Under the circumstances, to permit the plaintiffs to recover punitive damages is to reward double dealing and to punish an employer who acts honorably and decently.

Wherefore, defendant respectfully prays that the petition for rehearing be granted.

Respectfully submitted

DAVIDOW & DAVIDOW,
By LARRY S. DAVIDOW,
Attorneys for Defendant.

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1945.

Thomas Martino, Petitioner, vs. Michigan Window Cleaning Co. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 4, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

The questions here are the same as those in *Roland Electrical Co.* v. *Walling*, — U. S. —, No. 45, decided January 28, 1946. They are (1) whether respondent's employees, under the facts of this case, are engaged "in the production of goods for commerce" within the meaning of §§ 6 and 7 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 1062-1063, 29 U. S. C. §§ 206 and 207), and (2) whether if so engaged they nevertheless are exempted from the Act because they are engaged in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of § 13(a)(2), 29 U. S. C. § 213(a)(2). As in the *Roland Electrical Co.* case, we answer the first question in the affirmative and the second in the negative. The respondent also urges as a defense the written agreements which it had renewed from year to year with its employees for a higher number of hours of work per week, before paying overtime, than is prescribed in the Act.

The petitioner sued the respondent in the District Court of the United States for the Eastern District of Michigan. He sued for himself as a former employee of the respondent and also in a representative capacity for its other employees similarly situated. He sought to enjoin the respondent from violation of § 15(a)(1)(2)(3), 29 U. S. C. § 215(a)(1)(2)(3), of the Fair Labor Standards Act of 1938 and to recover under § 16(b) of the Act[1]

[1] "Sec. 16. . . .

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and

unpaid overtime compensation together with a like sum as liquidated damages, a reasonable attorney's fee and costs.

The District Court heard the case on the pleadings, stipulations of fact and the petitioner's motion for summary judgment, made several findings of law, ordered that the petitioners recover nothing and dismissed the complaint. 51 F. Supp. 505. The Circuit Court of Appeals affirmed the dismissal. 145 F. 2d 163. This Court has granted a writ of certiorari because of divergence of opinions among the Circuit Courts of Appeals as to the interpretation of § 13(a)(2), and now decides this case in favor of petitioners, upon principles stated in *Roland Electrical Co.* v. *Walling, supra.*

The respondent, a Michigan corporation with its principal place of business in Detroit, was engaged in washing windows, painting and similar maintenance work. The employees of the respondent were required in some instances to work longer than 42 hours per week subsequent to October 24, 1939, and longer than 40 hours per week subsequent to October 24, 1940, but were not paid time and a half except for hours worked in excess of 44 hours per week.[2]

The work of the respondent and of its employees was done within the State of Michigan and, for the most part, on the premises of the respondent's customers. It consisted primarily of cleaning the windows for those customers, always under contracts between them and the respondent. The greater part of this work

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in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 52 Stat. 1069, 29 U. S. C. § 216(b).

[2] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U. S. C. § 207(a).

The Fair Labor Standards Act of 1938 was approved June 25, 1938, and this section became effective October 24, 1938. 29 U. S. C. § 207(d).

was done on windows on premises used by respondent's customers in the production of goods for interstate commerce.[3] Under the circumstances of this case the cleaning of the windows of industrial plants by the employees of the respondent is an occupation necessary to the production of the goods produced in those plants.[4] If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act. Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524; *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 90.

The respondent was engaged almost exclusively in servicing customers for whom such services were necessary in their production of goods for interstate commerce. This took place in the midst of producing "the flow of goods in commerce" intended to be covered by the Act. Accordingly, the respondent cannot be classified as a "retail or service establishment" within the meaning of § 13(a)(2) which contemplates an establishment serving ultimate consumers beyond the end of such "flow of goods in commerce." *Roland Electrical Co.* v. *Walling*, *supra*.

Throughout this case, the respondent has urged as a defense that, in good faith and from year to year, since before 1939, it has entered into and renewed written agreements with the labor union of which petitioner and those for whom this suit is brought were members. Some of these agreements, renewed since the Act became effective, applied to the periods here in question and required the respondent to pay overtime for work done in excess of 44 hours a week. This requirement was fully observed. The Dis-

[3] Many of the customers were engaged also in interstate commerce on those premises.

[4] "... an employee shall be deemed to have been engaged in the production of goods if such employee was employed ... in any process or occupation necessary to the production thereof, in any State." (29 U. S. C. § 203(j).

See 100 Factory Management and Maintenance, March 1942, p. 101; 74 Architectural Forum, May 1941, pp. 333, 335; 41 National Safety News, March, 1940, p. 88; Balderston, Karabasz and Brecht, *Management of an Enterprise* (1935) p. 145; Canover, *Clean Windows for Safety*, 74 Safety Engineering, Sept. 1937, pp. 13-14; 63 The Foundry, Aug. 1935, p. 89; Pandall and Martin, *Making your Windows Deliver More Daylight*, 22 Transactions of the Illuminating Engineering Society, March 1927, pp. 239-257.

trict Court made a finding that the existence and observance of such agreements constituted no bar to the right of the employees to recover under § 16(b) if the Fair Labor Standards Act applied to the case and required overtime pay for work done in excess of a lesser number of hours per week than were stipulated in the agreements. It was not necessary for the Circuit Court of Appeals to consider the effect of this agreement because, in its view, the Act did not apply to the respondent's employees. However, under the view which we take, the respondent is entitled to a decision on this further defense. We agree with the District Court that the agreements cannot supersede the Act and are not a bar to this action. Cf. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 707, *et seq.*

For these reasons, the judgment of the Circuit Court of Appeals is reversed and this case is remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.